money back based on the so-called indemnity agreement of June 8, 1969. When the solvency of the company became suspect with the filing of the winding up petition by one of the company's creditors, the plaintiff not unnaturally was anxious as to the fate of his unsecured loan. He immediately jumped the gun by entering into the June 1969 Agreement with the defendant who was then the managing director of the company. It is interesting to note that, although the defendant undertook to pay the plaintiff on or before August 30, 1969, he was literally forced to issue a cheque for $5,000 in favour of the plaintiff post-dated to July 14, 1969. The defendant is not a man of means and from the unchallenged evidence of Mr. Ramanathan, when the defendant signed the undertaking he was not in fact in a financial position to pay the plaintiff $10,000 by August 30, 1969. Mr. Thayalan who drew up the June 1969 Agreement must have known that the so-called indemnity agreement was a worthless piece of document, and I can only infer that that was the very reason why the defendant was pressured to issue a cheque for $5,000 payable before the due date as part payment of the sum of $10.000. In this case, the plaintiff has not sued the defendant on the dishonoured cheque in the alternative as a separate cause of action. From the evidence, the plaintiff's remedy, if any, for the recovery of his $10,000 must necessarily be confined to the March 1969 Agreement which is still valid and enforceable. For whatever it is worth, he can still demand from the company for the return of his money, or alternatively he may perhaps sue the defendant on the $5,000 cheque.

Under the circumstances, I would dismiss the plaintiff's claim with costs.

Claim dismissed.

Solicitors: *L. H. Singh & Co.; R. K. Nathan & Co.*

TAN KIM KUAN v. LIEW YEW SANG

[A.C.J. (Suffian F.J.) January 24, 1973]

[Kuala Lumpur — Civil Appeal No. 36 of 1971]

Landlord and Tenant — Tenant receiving letter from new owner's solicitors warning him not to pay rent to landlord — Whether justified in not paying rent to landlord — When tenant estopped from denying landlord's title — Evidence Ordinance, 1950, s. 116.

The appellant had obtained a warrant of distress for rent against the respondent. The respondent applied to have the warrant set aside. He alleged that he had received a letter from the new owners of the land warning him not to pay rent to the appellant. The learned President of the Sessions Court set aside the warrant of distress and the appellant appealed.

Held: (1) for so long as he remains in possession the tenant may not deny the title of his landlord at the beginning of the tenancy. If he wishes to deny his landlord's title at the beginning of the tenancy he must first surrender possession. But without surrendering possession the tenant may say that his landlord's title has since the beginning of the tenancy come to an end; or that he (the tenant) has been evicted by a paramount title holder; or that even though there was no actual eviction or dispossession from the property, under a threat of eviction he has as a result of such a threat attorned to the paramount holder;

(2) in this case all that the respondent had alleged was that he had received a letter from the new owner's solicitors warning him not to pay rent to the landlord. This was not sufficient to establish that the landlord's title had come to an end and in the circumstances the learned President was wrong in setting aside the warrant of distress.

Cases referred to:-

(1) *Hirabai* v. *Palode* A.I.R. 1955 Nagpur 234.

(2) *Farngu* v. *Ram* A.I.R. 1959 Punjab 564.

(3) *Ban Seng* v. *Yap Pek Soo* [1967] 2 M.L.J. 156.

(4) *Ong Choon* v. *Chow Mee* K.L. Civil Appeal No. 16 of 1968, unreported.

(5) *Bhaiganti Bewa* v. *Himmat* A.I.R. 1917 Cal. 498.

(6) *Mt. Bilas Kunwar* v. *Desraj Ranjit Singh* A.I.R. 1915 P.C. 96.

(7) *Nadar* v. *Ranganathan* A.I.R. 1954 Mad 402.

(8) *Annamalai Chettiar* v. *Molaiyan* A.I.R. 1970 57 Mad 396, 397.

(9) *Muthu Nayan* v. *Sinna Sama Vaiyan* (1905) I.L.R. 28 Madras 526.

CIVIL APPEAL.

T. Selvarasan for the appellant.

C. M. Wong for the respondent.

Suffian F.J.: Tan Kim Kuan, landlord, applicant in the lower court and appellant before me, was owed 12 months' rent totalling $720 by his tenant Liew Yew Sang, respondent both in the lower court and before me. The landlord obtained a warrant of distress against him. The tenant applied for the warrant to be set aside. The learned president set it aside, and the landlord appeals to this court.

The facts very briefly are as follows. The premises concerned is a temporary building known as No. 102, 4½ mile, Ipoh Road, Kuala Lumpur. It stands on part of land which originally belonged to Jamiah binti Haji Abdul Rahim. After her death the land was bought by Sharikat Bakti Ltd. Apparently there were other buildings erected on the land. The new owners of the land, claiming that owners of the buildings were trespassers, sent a letter to all of them saying that they were in unlawful occupation, that certain persons were collecting rent from persons occupying the buildings, that they had no authority to do so, that paying rent to them would not give a right to occupy the buildings, and that only Sharikat Bakti Ltd. had authority to permit the occupants to remain in occupation. This letter was dated 10th January, 1966. The landlord-appellant claims that he never received this letter, but I do not think this important. The tenant-respondent did receive this letter, and as a result he stopped paying rent to the landlord. He did not pay rent for the whole of 1966 and it was in respect of these arrears that the landlord obtained a warrant of distress.

It is a fact that the new owners of the land, Sharikat Bakti Ltd., brought action in the High Court against some of the owners of the buildings, but not against this landlord-appellant, and in four of them succeeded in persuading the court to declare that the owners were trespassers and to restrain them from

entering or remaining on the land, and it is also a fact that at the time when the tenant's application to set aside the warrant of distress was heard, there were other civil suits by the new owners pending against the owners of other buildings. It was because these suits were pending that the learned president set aside the warrant of distress.

It is clear from the record that in the lower court the tenant also argued that in view of the existence of the new owners, Sharikat Bakti Ltd., the landlord-appellant had no right to receive any rent and that therefore the tenant-respondent was entitled to refuse to pay him any rent. The learned president did not however expressly deal with this point, but it can be inferred from his decision that he agreed with the tenant's argument.

The landlord argues before me that the learned president was wrong as the tenant was estopped by section 116 of the Evidence Ordinance from denying his landlord's title.

Thus the only issue in this appeal is whether the tenant was estopped by section 116 of the Evidence Ordinance from denying his landlord's title in the way he did in this case.

That section reads:

"No tenant of immovable property... shall during the continuance of the tenancy be permitted to deny that the landlord... had at the beginning of the tenancy a title to such immovable property; ..."

Inche T. Selvarasan on behalf of the landlord says that the tenant was so estopped: and he cites in support two Indian cases, *Hirabai* v. *Palode*[1] and *Farngu* v. *Ram*;[2] and two local cases, namely, *Ban Seng* v. *Yap Pek Soo*[3] and an unreported judgment of Yong J. in *Ong Choon* v. *Chow Mee*.[4]

In *Hirabai's* case,[1] the first case relied on by Inche Selvarasan, the question was whether a tenant could deny the title of his landlord after the termination of the tenancy.

The judgment of the court quoted with approval a statement by Mooker J. in *Bhaiganti Bewa* v. *Himmat*[5] —

"Enjoyment by permission is the foundation of the rule that a tenant shall not be permitted to dispute the title of his landlord. Two conditions then are essential to the existence of the estoppel, first, possession, secondly permission; and when these conditions are present, the estoppel arises, and the estoppel prevails so long as such possession continues."

The judgment referred to a decision of the Privy Council in *Mt. Bilas Kunwar* v. *Desraj Ranjit Singh*.[6] The court said:

"In [that case], the suit was brought for possession by a landlord against the tenant who refused to deliver possession after a notice to quit. Their Lordships observed: '... a tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord.'"

The judgment then went on —

"The fact that in the present case the tenancy came to an end by reason of forfeiture and the landlord served a notice asking the tenants to vacate the house did not make any difference to the applicability of the rule of estoppel which is grounded on the tenant being still on the premises which he had obtained from the landlord. The estoppel continues so long as the tenant does not surrender possession to the landlord."

Thus the court held that a tenant could not deny the title of his landlord after the termination of the tenancy for so long as the tenant remained in possession.

In *Farngu's* case,[2] the second case relied on by Inche Selvarasan, the question was whether a tenant was at liberty to deny his landlord's title while he retained the possession under which he originally entered, which A. N. Bhandari C.J. answered in the negative. His Lordship said —

"This section [section 116 of the Indian Evidence Act which is the same as our section 116] accords statutory recognition to the well-known doctrine that during the existence of the relationship of landlord and tenant the tenant is estopped from denying his landlord's title or from asserting that another person has a better title than the landlord. The doctrine has no application where the landlord's title has expired or been extinguished or where there has been a fraud on the part of the landlord in the execution of a lease, or where the tenant did not obtain or retain possession under the lease or by virtue of it, or where he has been evicted by title paramount. A person who is evicted by such a title is at liberty to deny his landlord's title, for an eviction is equivalent to a termination of the tenancy. Even if a tenant is not actually evicted, but if a judgment of eviction has been passed against him, a tenant is justified in treating the relationship of tenancy at an end and at liberty to give a new and rightful character to his possession."

In *Ban Seng's* case,[3] Gill J. (as he then was) said at page 156 that if the holder of a Temporary Occupation Licence builds a house on state land and lets it out on rent,

"there would clearly be the relationship of landlord and tenant as between the holder of the licence and the person to whom the house is rented. If the Temporary Occupation Licence is subsequently cancelled, this relationship does not cease to exist because the tenant cannot then plead the Ruler's superior title unless he can show a better right to possession in himself which he can do only if he has had a Temporary Occupation Licence issued to him. ... Similarly if a person builds a house on state land without obtaining a Temporary Occupation Licence and lets it out, his tenant is estopped from denying his title unless he (his tenant) can set up a better title in himself."

With respect I do not think that the fourth case cited by Inche Selvarasan is relevant to the determination of the question before me.

Inche C. M. Wong on behalf of the tenant concedes that the tenant cannot deny his landlord's title but contends that this is so only as regards the beginning of the tenancy and that the tenant can deny, as he here does, the landlord's title after the commencement of the tenancy, and Inche Wong cites in support two Indian cases, namely, *Nadar* v. *Ranganathan*[7] and *Annamalai Chettiar* v. *Molaiyan*.[8]

In *Nadar's* case,[7] paragraph (a) of the headnote reads as follows:

"The estoppel under section 116 is restricted to the denial of the title at the commencement of the tenancy. From this, the exception follows that it is open to the tenant even without surrendering possession to say that since the date of the tenancy, the title of the landlord came to an end or that he was evicted by a paramount title holder or that even though there was no actual eviction of dispossession from the property, under a threat of eviction he had attorned to the paramount title holder. In order to constitute eviction by title paramount, it has been established by decisions in England and in India that it is not necessary that the tenant should be dispossessed or even that there should be a suit

in ejectment against him. It will be sufficient if there was threat of eviction and if the tenant as a result of such threat attorns to the real owner, he can set up such eviction by way of defence either to an action for rent or to a suit in ejectment. If the tenant, however, gives up possession voluntarily to the title holder, he cannot claim the benefit of this rule."

In *Annamalai Chettiar's* case,[8] the second case relied on by Inche Wong, the following passages occur in the judgment:

"In (*Kunwar's* case[6]), the Privy Council has laid down that a tenant who has been let into possession cannot deny the landlord's title however defective it may be, so long as he has not openly restored possession by surrendering to his landlord. In *Muthu Nayan* v. *Sinna Sama Vaiyan*[9] this court has laid down that a tenant is estopped from denying the title of the landlord without his surrendering possession.

Section 116 of the Evidence Act clearly says that the tenant is estopped from denying, during the continuation of the tenancy, that the landlord had title at the commencement of the tenancy. Possession and permission being established, estoppel would bind the tenant during the continuation of the tenancy and until he surrenders his possession. The words 'continuation of the tenancy' have been interpreted to mean 'during the continuation of the possession that was received or under the tenancy in question', and courts have repeatedly laid down that estoppel operates even after the termination of the tenancy so that a tenant who had been let into possession, however defective it may be, so long as he has not openly surrendered possession, cannot dispute the title of the landlord at the commencement of the tenancy.

The estoppel contemplated by section 116 of the Indian Act is, as I have observed, restricted to the denial of title at the commencement of the tenancy and by implication, it follows that a tenant is not estopped from contending that the landlord had no title before the tenancy commenced or that the title of the lessor has since come to an end."

It seems to me that the effect of the above decisions may for the purpose of this appeal be summarised as follows: for so long as he remains in possession a tenant may not deny the title of his landlord at the beginning of the tenancy. If he wishes to deny his landlord's title at the beginning of the tenancy, he must first surrender possession. But without surrendering possession the tenant may say that his landlord's title has since the beginning of the tenancy come to an end; or that he (the tenant) has been evicted by a paramount title holder; or that even though there was no actual eviction or dispossession from the property, under a threat of eviction he has as a result of such threat attorned to the paramount title holder.

But what exactly does the tenant say here? He does not say that he has been evicted by Sharikat Bakti Ltd. or that under a threat of eviction he has as a result of the threat attorned to the Sharikat. All he says is that since the purchase of the land by the Sharikat he has received a letter from the Sharikat's solicitors warning him not to pay rent to the landlord. In my view he is entitled to say this even though he remains in possession of the house; but what he says is insufficient evidence that the landlord's title has come to an end.

In view of this, I am of the opinion that the learned president was wrong in setting aside the warrant of distress and I would therefore allow this appeal with costs here and below.

Appeal allowed.

Solicitors: *T. Selvarasan; Laycock & Ong.*

TOMM WONG v. PUBLIC PROSECUTOR

[F.C. (Ong C.J., Gill and Ong Hock Sim F.JJ.)

January 29, 1973]

[Ipoh — Federal Court Criminal Reference No. 6 of 1972]

Penal Code s. 170 — Personating a public servant — Meaning of words "in such assumed character does or attempts to do any act under colour of such office" — Whether words cover acts which fall outside permitted limits of authority or power.

In this case the applicant had been charged for the offence of personating a public servant. It appeared that he had gone to a police station to lodge a report and pretended to hold the office of a detective police constable. The learned magistrate acquitted the applicant holding that the applicant had not done any act "under colour of such office," as making a report is a right open to any member of the public. On appeal the order of acquittal was set aside by the High Court, but the judge agreed to refer the question of law to the Federal Court as follows:—

"Do the words 'in such assumed character does or attempts to do any act under colour of such office' appearing in section 170 of the Penal Code refer only to such acts as could legally be done by a person who in fact and in truth holds such office or do such words also cover acts which fall outside the permitted limits of the actual authority or power conferred or vested in the public servant whose character the accused pretends to assume."

Held: an offence under section 170 of the Penal Code is committed whenever any person falsely holds himself out to be a public servant and does or attempts to do any act whatsoever under colour of such office. The harmless character of that act or attempt may be relevant as to punishment, but the offence under section 170 is nonetheless committed whenever any act is done or attempted to be done by a person impersonating a public servant.

Case referred to:-

(1) *Emperor* v. *Aziz-ud-din* (1905) I.L.R. 27 All. 294, 295.

FEDERAL COURT.

Choong Yik Son for the applicant.

Gunn Chit Tuan (Deputy Public Prosecutor) for the respondent.

Ong C.J.: The question referred to this court under the provisions of section 66 of the Courts of Judicature Act 1964 is as follows: —

"Do the words 'in such assumed character does or attempts to do any act under colour of such office' appearing in section 170 of the Penal Code refer only to such acts as could legally be done by a person who in fact and in truth holds such office or do such words also cover acts which fall outside the permitted limits of the actual authority or power conferred or vested in the public servant whose character the accused pretends to assume."

The applicant Tomm Wong had been tried in the Magistrate's Court at Ipoh and acquitted of a charge which reads: —

"That you on 7.4.1971 at 9.20 p.m. at the New Town Police Station, Ipoh, in the District of Kinta, in the State of Perak, pretended to hold the office of the detective police constable 1209 and under such assumed character did lodge a report at the New Town police Station under colour of such office and thereby committed an offence punishable under section 170 of the Penal Code."

Section 170 of the Penal Code relates to the offence of personating a public servant and provides: —

"Whoever pretends to hold any particular office as a public servant, knowing that he does not hold such office, or falsely personates any other person holding such office, and in such assumed character does or attempts to do any act under